

# **EXHIBIT 1**

IN THE MISSOURI COURT OF APPEALS  
EASTERN DISTRICT

BRUCE FRANKS, JR.,	)	
	)	No. ED104797
Respondent,	)	
	)	Appeal from the Circuit Court
v.	)	of the City of St. Louis
	)	Cause No. 1622-CC09996
PENNY HUBBARD	)	
	)	
Appellant.	)	

**BOARD OF ELECTION COMMISSIONS OF THE CITY OF ST. LOUIS'**  
**MOTION FOR LEAVE TO FILE AND**  
**MOTION TO MODIFY COURT'S SEPTEMBER 13, 2016 OPINION**

**INTRODUCTION**

On September 13, 2016 the Court issued its Opinion, affirming a new primary election needed to be held in the 78<sup>th</sup> State House District. The Court analyzed the absentee ballot voting process that had occurred in the primary voting for the election. The Board of Election Commissioners of the City of St. Louis ("the Board") seeks clarity as to the Court's Opinion regarding the use of touch-screen voting machines in absentee voting in future elections. Members of the public, including the Missouri Council for the Blind, and other election authorities have expressed concern regarding the Opinion's impact on touch-screen voting. *See* Exhibits A, B. Absentee voting for the November 8, 2016 election has already begun in the City of St. Louis. The Board seeks a modification of the Court's Order so it is clear the Board may proceed with use of the touch-screen machines for voters requiring electronic assistance.

### **MOTION FOR LEAVE**

The Board was originally named as a party in this litigation but was dismissed at the trial court because RSMo. §§ 115.526 and 115.531 do not permit a contestee of an election to bring suit against the election administrators. Since the filing of the Court's Opinion, the Board has been directly impacted as questions have arisen regarding the Opinion's control on the use of touch-screen voting machines. Given the public nature of these facts and the impact to future elections, the Board seeks leave of Court to file its Motion to Modify. Leave should be granted so the Court may decide the merits of the Board's Motion.

### **MOTION TO MODIFY<sup>1</sup>**

The Board seeks clarification as to whether the Opinion is intended to preclude touch-screen absentee ballot voting for the disabled. Touch-screen voting may be required by numerous federal statutes, including: the Help America Vote Act<sup>2</sup>, Section 504 of the Rehabilitation Act<sup>3</sup>, and/or the Americans with Disabilities Act<sup>4</sup>. Pursuant to the Supremacy Clause of the U.S. Constitution, these laws appear to require the Board allow qualified disabled voters access to a non-visual voting machines and an opportunity to vote in private without assistance. The United States Court of Appeals for the Fourth Circuit upheld access to electronic voting under the Americans with Disabilities Act held earlier this year. *Nat'l Fed. Of the Blind, et al. v. Lamone, et al.*, 813 F.3d 494 (4th Cir. 2016). For instance, persons with visual impairments or manual dexterity impairments may be unable to complete a paper ballot without assistance from another person and might require such persons to disclose their choice of candidates to election officials or others. On the other hand, touch-screen voting machines can

---

<sup>1</sup> This Motion is timely filed within fifteen days after the Court filed its opinion. Mo. Sup. Ct. R. 84.17(b).

<sup>2</sup> 52 U.S.C. § 20901-21145

<sup>3</sup> 29 U.S.C. § 794

<sup>4</sup> 42 U.S.C. § 12101 *et seq.*

be adapted to have an audio feature with headphones that would allow the visually impaired to vote confidentially. Some disabled voters may not be able to vote or vote confidentially without touch-screen voting machines.

Although the Court's Opinion regarded the primary for the 78<sup>th</sup> State House District, it has potentially impacted administration of future absentee voting in separate elections, including the upcoming November 8, 2016 presidential election. The Board's Chair received a letter on September 23, 2016 from John Ammann of the St. Louis University Law School Legal Clinics in his capacity as an attorney for the Executive Director of the Missouri Council for the Blind. Exhibit A. Mr. Ammann expressed concerns for the disabled if touch-screen absentee voting is not available to the disabled. A September 26, 2016 St. Louis Post-Dispatch article indicated election authorities throughout the State of Missouri share these concerns. Exhibit B.

Therefore, the Board respectfully suggests the Court modify its September 13, 2016, Opinion pursuant to this Motion or the Court's own motion to add clarification as to the Opinion's impact on touch-screen voting machines. The Board respectfully suggests the following sentence: "This Opinion does not bar the use of touch-screen absentee ballot voting without the use of envelopes for persons who appear in person to vote absentee and who demonstrate that a disability prevents them from voting using a paper ballot but would be able to vote using a touch-screen voting machine."

Respectfully submitted,

LATHROP & GAGE LLP

/s/ Matthew Jacober

Matthew A. Jacober  
David W. Sweeney, # 57144  
Patricia L. Silva # 67213  
Joshua L. Loevy, #66047  
[mjacob@lathropgage.com](mailto:mjacob@lathropgage.com)  
[psilva@lathropgage.com](mailto:psilva@lathropgage.com)  
[jloevy@lathropgage.com](mailto:jloevy@lathropgage.com)  
7701 Forsyth Boulevard, Suite 500  
Clayton, Missouri 63105  
Phone: (314) 613-2800  
Fax: (314) 613-2801  
**Attorneys for Board of Election**  
**Commissioners of the City of St. Louis**

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the above pleading was served on this 28th day of September, 2016, via the Court's electronic filing system and by electronic mail to the following counsel of record:

Jane Dueker  
Arthur Gregg  
1 North Brentwood Blvd  
Suite 1000  
Clayton, MO 63105  
[jdueker@spencerfane.com](mailto:jdueker@spencerfane.com)  
[agregg@spencerfane.com](mailto:agregg@spencerfane.com)  
Michael J. Colona  
4387 Laclede Ave.  
St. Louis, MO 63108  
[mikecolonalaw@gmail.com](mailto:mikecolonalaw@gmail.com)  
ATTORNEYS FOR APPELLANT

David Roland  
14779 Audrain Rd. 815  
Mexico, MO 65265  
[libertyandjustice@gmail.com](mailto:libertyandjustice@gmail.com)  
ATTORNEY FOR RESPONDENT

/s/ Matthew A. Jacober



SAINT LOUIS  
UNIVERSITY

— EST. 1818 —

SCHOOL OF LAW

Legal Clinics

100 N. Tucker Blvd.  
Suite 704  
St. Louis, MO 63101

P 314-977-2778  
F 314-977-1180

www.slu.edu

September 23, 2016

Mr. Erwin Switzer  
Chairman  
St. Louis City Board of Election Commissioners  
300 North Tucker  
St. Louis, Mo. 63101

Re: Accessible voting

Dear Mr. Switzer:

I represent Christopher Gray, who is the Executive Director of the Missouri Council of the Blind and a registered voter in the City of St. Louis, in connection with his desire to use an accessible voting machine during the absentee voting period for the November 8, 2016, election.

We have been told that the St. Louis City Board of Election Commissioners does not plan to have touch-screen voting machines, or the software that allows a blind person to vote using a "talking voting machine," available during the absentee voting period prior to the November election. We also understand that the Board may believe the recent decision by the Missouri Court of Appeals in *Franks v. Hubbard*, ED104797, restricts the type of absentee voting methods that can be used, so as not to allow the use of the touch-screen machines.

We believe that this position violates the Americans with Disabilities Act, Section 504 of the Rehabilitation Act, and the Help America Vote Act, all of which are federal laws. Since federal law supersedes state law under the Supremacy Clause, the rights ensured by these acts must be given effect.

A recent decision by the Fourth Circuit Court of Appeals, *National Federal of the Blind v. Lamone*, supports our position in this matter. A copy of that decision is enclosed.

Higher purpose. Greater good.

EXHIBIT A

Therefore, Mr. Gray is requesting that a reasonable accommodation be made to allow him and others with disabilities who request it, to vote absentee at the election board office using a touch-screen machine programmed. In the case of the blind, the machine should have audio software that will allow him to vote independently and privately on a "talking voting machine."

In addition, we request an assurance that the accessible machines will be available for absentee voting, in addition to election day voting, not just for federal elections, but for all local elections in the future as well.

We are prepared to pursue all appropriate legal remedies in the event we have not heard from you that this accommodation will be allowed. Please advise us by 5 p.m. on Tuesday, September 27.

Thank you for your cooperation.

Sincerely,

A handwritten signature in dark ink, appearing to read "John J. Ammann". The signature is fluid and cursive, with the first name "John" and last name "Ammann" clearly distinguishable.

John J. Ammann  
Attorney at Law  
Professor of Law

Enclosure

813 F.3d 494  
United States Court of Appeals,  
Fourth Circuit.

NATIONAL FEDERATION OF THE BLIND; Kenneth Capone;  
Melissa Riccobono; Janice Toothman, Plaintiffs–Appellees,

v.

Linda H. LAMONE, State Administrator, State Board of Elections, in her official capacity; David McManus, Jr., Chairman, State Board of Elections, in his official capacity; Bobbie S. Mack, Member, State Board of Elections, in her official capacity; Patrick J. Hogan, Member, State Board of Elections, in his official capacity; Michael R. Cogan, Member, State Board of Elections, in his official capacity; Kelly A. Howells, Member, State Board of Elections, in her official capacity, Defendants–Appellants

and

American Council of the Blind of Maryland; Verifiedvoting.Org;

Saveourvotes.Org; Cindy Labon; Charles Crawford; Jane Sheehan, Intervenor.

Civil Rights Education and Enforcement Center; Maryland Disability Law Center; Adapt Maryland; American Civil Liberties Union; Arc Maryland; Arc of the United States; Association of Assistive Technology Programs; Disability Law Center for Virginia; Disability Rights Advocates; Disability Rights International Association; Disability Rights Education & Defense Fund; Disability Rights North Carolina; Freedom Center; Image Center for People with Disabilities; Independence Now; Judge David L. Bazelon Center for Mental Health Law; League for People with Disabilities; Maryland Developmental Disabilities Council; Maryland Disabilities Forum; National Association of the Deaf; National Disability Rights Network; On our Own of Maryland; Paralyzed Veterans of America; People on the Go; Protection Advocacy for People with Disabilities; Southern Maryland Center for Independent Living; United Spinal Association; West Virginia Advocates; United States of America, Amici Supporting Appellants

No. 14–2001.

Argued: Oct. 28, 2015.

Decided: Feb. 9, 2016.

**Synopsis**

**Background:** Blind, would-be voters in upcoming election brought cause of action under the Americans with Disabilities Act (ADA), challenging Maryland's absentee voting program as violative of their rights. The United States Court of Appeals for the District of Maryland, Richard D. Bennett, J., 2014 WL 4388342, found that Maryland's absentee voting program did not comply with the ADA and granted injunctive relief, and appeal was taken.

**Holdings:** The Court of Appeals, Floyd, Circuit Judge, held that:

[1] court had to focus on absentee voting program in particular, rather than on Maryland's voting program in general, in deciding whether Maryland's failure to make online ballot marking tool available for use in upcoming election would deprive blind would-be voters of “benefits of such service, program or activity” in violation of the ADA;



[2] Maryland's actions deprived blind, would-be voters of opportunity to participate in absentee voting program that was equal to that afforded to others;

[3] district court did not clearly err in finding that proposed modification was reasonable modification; and

[4] Maryland failed to satisfy its burden of showing that implementation of proposed modification, by making ballot marking tool available for use in upcoming election, would fundamentally alter absentee voting program.

Affirmed.

West Headnotes (16)

[1] **Federal Courts** ➤ Questions of Law in General

**Federal Courts** ➤ "Clearly erroneous" standard of review in general

Court of Appeals reviews judgments resulting from bench trial under a mixed standard of review: factual findings may be reversed only if clearly erroneous, while conclusions of law are examined de novo.

1 Cases that cite this headnote

[2] **Civil Rights** ➤ Discrimination by reason of handicap, disability, or illness

To make out a violation of Title II of the Americans with Disabilities Act (ADA), plaintiffs must show: (1) that they have disability, (2) that they are otherwise qualified to receive benefits of public service, program or activity, and (3) that they were denied the benefits of this service, program or activity, or otherwise discriminated against, on basis of their disability. Americans with Disabilities Act of 1990, § 202, 42 U.S.C.A. § 12101.

1 Cases that cite this headnote

[3] **Civil Rights** ➤ Physical access and mobility; carriers

Court had to focus on absentee voting program in particular, rather than on Maryland's voting program in its entirety, in deciding whether Maryland's failure to make online ballot marking tool available for use in upcoming election deprived blind would-be voters of "benefits of such service, program or activity" in violation of their rights under the Americans with Disabilities Act (ADA); accordingly, mere fact that blind would-be voters had full access to Maryland's in-person polling places and ability to cast their votes in person did not mean that there was no ADA violation if, due to Maryland's failure to make online ballot marking tool available, blind, would-be voters were denied ability, without third-party assistance, to use absentee ballot. Maryland law authorized any voter to cast. Americans with Disabilities Act of 1990, § 202, 42 U.S.C.A. § 12101.

Cases that cite this headnote

[4] **Civil Rights** ➤ Handicap, Disability, or Illness

Americans with Disabilities Act (ADA) was enacted to remedy widespread discrimination against individuals. Americans with Disabilities Act of 1990, § 2 et seq., 42 U.S.C.A. § 12101 et seq.

Cases that cite this headnote

[5] **Civil Rights** ➡ Administrative agencies and proceedings

Regulations promulgated by the Department of Justice to implement the Americans with Disabilities Act (ADA) are given controlling weight unless they conflict with other departmental regulations or with itself. Americans with Disabilities Act of 1990, § 2 et seq., 42 U.S.C.A. § 12101 et seq.

Cases that cite this headnote

[6] **Civil Rights** ➡ Physical access and mobility; carriers

Maryland's failure to make online ballot marking tool available for use in upcoming election, which deprived blind, would-be voters from casting absentee ballots in election other than with assistance of the deprived blind, would-be voters of opportunity to participate in absentee voting program that was equally afforded to others, in alleged violation of provision of the Americans with Disabilities Act (ADA). Americans with Disabilities Act of 1990, § 2 et seq., 42 U.S.C.A. § 12101 et seq.

Cases that cite this headnote

[7] **Civil Rights** ➡ Physical access and mobility; carriers

Voting is quintessential public activity, access to which is protected by the Americans with Disabilities Act (ADA); ensuring that disabled individuals are afforded an opportunity to participate in voting that is afforded to others helps ensure that disabled individuals are never relegated to position of powerlessness. Americans with Disabilities Act of 1990, § 202, 42 U.S.C.A. § 12132.

1 Cases that cite this headnote

[8] **Civil Rights** ➡ Discrimination by reason of handicap, disability, or illness

Not all public services, programs or activities can be made meaningfully accessible to all citizens, and, for that reason, in order to prevail on American with Disabilities Act (ADA) claim premised on denial of meaningful access to public program, plaintiffs must propose a reasonable modification to the challenged program that will allow them the meaningful access they seek. Americans with Disabilities Act of 1990, § 202, 42 U.S.C.A. § 12132.

Cases that cite this headnote

[9] **Civil Rights** ➡ Discrimination by reason of handicap, disability, or illness

Proposed modification to public program in order to permit meaningful access thereto by the disabled must be regarded as "reasonable modification," which public entity will have obligation to implement under the Americans with Disabilities Act (ADA), if proposed modification is reasonable on its face, or used in the run of cases, and will not cause undue hardship. Americans with Disabilities Act of 1990, § 202, 42 U.S.C.A. § 12132; 28 C.F.R. § 35.130(b)(7).

Cases that cite this headnote

[10] **Civil Rights** ➤ Discrimination by reason of handicap, disability, or illness

In cause of action under the Americans with Disabilities Act (ADA), determination of reasonable proposed modification to public program in order to permit meaningful access thereto by the disabled is generally fact-specific. Americans with Disabilities Act of 1990, § 202, 42 U.S.C.A. § 12132.

Cases that cite this headnote

[11] **Civil Rights** ➤ Physical access and mobility; carriers

District court did not clearly err, in cause of action brought by blind, would-be voters challenging Maryland's absentee voting program as violative of their rights under the Americans with Disabilities Act (ADA), finding that online ballot marking tool which was previously made available by state for use in earlier elections and which permitted blind voters to mark ballots on line without assistance of third party, was a reasonable modification that would provide blind voters with meaningful access to absentee voting program, if tool had already been developed, such that there did not appear to be any substantial cost or undue burden, and given that tool was employed in earlier elections without any apparent incident. Americans with Disabilities Act of 1990, § 202, 42 U.S.C.A. § 12132; 28 C.F.R. § 35.130(b)(7).

Cases that cite this headnote

[12] **Civil Rights** ➤ Discrimination by reason of handicap, disability, or illness

Public entity need not implement even a reasonable modification to public program in order to make program meaningfully accessible to the disabled, if that modification would fundamentally alter the program. Americans with Disabilities Act of 1990, § 202, 42 U.S.C.A. § 12132; 28 C.F.R. § 35.130(b)(7).

Cases that cite this headnote

[13] **Civil Rights** ➤ Presumptions, Inferences, and Burdens of Proof

Defendants in cause of action under the Americans with Disabilities Act (ADA) bear burden of proving that proposed modification to public program, in order to make the program meaningfully accessible to the disabled, would result in fundamental alteration of the program. Americans with Disabilities Act of 1990, § 202, 42 U.S.C.A. § 12132; 28 C.F.R. § 35.130(b)(7).

Cases that cite this headnote

[14] **Civil Rights** ➤ Physical access and mobility; carriers

In cause of action brought by blind, would-be voters challenging Maryland's absentee voting program as violative of their civil rights, Maryland failed to satisfy its burden of showing that implementation of proposed modification, by making online ballot marking tool available for use in upcoming election, would not fundamentally alter absentee voting program; while online ballot marking tool had not been certified by requisite supermajority of its state election board, as required by state statute, interests served by certification requirement were sufficiently met by evidence that marking tool was reasonably secure, safeguarded

52 NDLR P 122

voters' privacy, and had been used in earlier elections without any apparent incident. American Disabilities Act of 1990, § 202, 42 U.S.C.A. § 12132; 28 C.F.R. § 35.130(b)(7).

1 Cases that cite this headnote

**[15] Civil Rights** ➡ Physical access and mobility; carriers

Mere fact that state had statutory certification requirement for implementation of any proposed modification to its absentee voting program did not insulate state from making otherwise reasonable modification to voting program to prevent discrimination against disabled would-be voters. Americans with Disabilities Act of 1990, § 202, 42 U.S.C.A. § 12132; 28 C.F.R. § 35.130(b)(7).

1 Cases that cite this headnote

**[16] States** ➡ Preemption in general

Supremacy Clause establishes that valid federal legislation can preempt state laws. U.S.C.A. Const. Art. VI, § 2, cl. 1.

Cases that cite this headnote

**Attorneys and Law Firms**

**\*497 ARGUED:** Julia Doyle Bernhardt, Office of the Attorney General of Maryland, Baltimore, Maryland, for Appellants. Jessica Paulie Weber, Brown, Goldstein & Levy, LLP, Baltimore, Maryland, for Appellees. Thomas J. Chandler, United States Department of Justice, Washington, D.C., for Amicus United States of America. **O** Brian E. Frosh, Attorney General of Maryland, Office of the Attorney General of Maryland, Baltimore, Maryland, for Appellants. Daniel F. Goldstein, Brown, Goldstein & Levy, LLP, Baltimore, Maryland, for Appellee. Robertson, Civil Rights Education and Enforcement Center, Denver, Colorado; Alyssa R. Fieo, Maryland Law Center, Baltimore, Maryland, for Amici Civil Rights Education and Enforcement Center, Maryland Disability Law Center, ADAPT Maryland, American Civil Liberties Union, Arc Maryland, Arc of the United States, Assistive Technology Act Programs, disAbility Law Center for Virginia, Disability Rights Advocates, Disability Rights Bar Association, Disability Rights Education & Defense Fund, Disability Rights North Carolina, Freedom of Information Act Center for People with Disabilities, Independence Now, Judge David L. Bazelon Center for Mental Health Law, League for People with Disabilities, Maryland Developmental Disabilities Council, Maryland Disability Rights Network, National Association of the Deaf, National Disability Rights Network, On Our Own of Maryland, Paralyzed Veterans of America, **\*498** People on the Go, Protection and Advocacy for People with Disabilities, Southern Maryland Center for Independent Living, United Spinal Association, and West Virginia Advocates. Vanita Gupta, Principal Assistant Attorney General, Mark L. Gross, Civil Rights Division, United States Department of Justice, Washington, D.C., for Amicus United States of America.

Before GREGORY, DUNCAN, and FLOYD, Circuit Judges.

**Opinion**

Affirmed by published opinion. Judge FLOYD wrote the opinion, in which Judge GREGORY and Judge I. L. R. joined.

FLOYD, Circuit Judge:

Maryland allows any voter to vote via absentee ballot. A voter may obtain a blank hardcopy absentee ballot by fax, or by downloading and printing one from a website. The hardcopy ballot must be marked by hand, and returned via mail or hand-delivery to the voter's local election board.

The National Federation of the Blind and individual disabled Maryland voters sued state election officials under Title II of the Americans with Disabilities Act ("ADA") and Section 504 of the Rehabilitation Act. Plaintiffs claimed that marking a hardcopy ballot by hand without assistance is impossible for voters with various disabilities, and that they therefore been denied meaningful access to absentee voting. After a bench trial, the district court found that the current program, as then structured, did not comport with ADA and Rehabilitation Act requirements. The district court found that plaintiffs' proposed remedy—the use of an "online ballot marking tool" that would enable disabled voters to mark their ballots electronically—was a reasonable modification that did not fundamentally alter Maryland's absentee voting program. Defendant election officials now appeal all these aspects of the district court's decision. For the reasons below, we affirm.

I.

A.

Elections in the State of Maryland are overseen by the State Board of Elections ("Board"). Md. Code Ann., §§ 2-101 to 102 (Westlaw current through the 2015 Regular Session of the General Assembly) ("Elec. Law"). The Board is comprised of five members. Elec. Law § 2-101(a). The Board appoints a State Administrator of Elections, designated as "the chief State election official" and tasked with administering Maryland's election apparatus.

Maryland provides its voters with a number of different means to vote. Maryland has nearly 2,000 polling places at which a voter may cast a ballot on Election Day. The overwhelming majority of these polling places are accessible to physically disabled voters and are staffed with election judges trained in serving voters with disabilities. Many of these places have voting machines that have a number of accessibility features designed to assist disabled voters in casting their ballots. Maryland's voting machines allow voters to magnify the font of the ballot, to alter the color contrast, and to provide an interface screen such that voters can sit down while casting their ballots. The voting machines can also be programmed for nonvisual access by means of an audio ballot; when using the audio features a voter receives a headset with a keypad to navigate the ballot choices. Voters who desire assistance in marking their ballots may be assisted by an individual of their choosing or by an election judge (in the presence of an election judge of another political party). \*499 Voting machines are not compatible with some common personal accessibility devices such as refreshable Braille displays.

Maryland also allows voters to vote in person for an eight-day period before Election Day at sixty-four early voting polling stations. All of these early voting polling places are physically accessible.

Finally, any Maryland voter may vote by absentee ballot. A voter can obtain a ballot by mail, fax, or electronically by downloading a ballot from a website. A voter who electronically downloads an absentee ballot must print out the ballot in hardcopy, mark their choices by hand, and then sign and return the hardcopy ballot to their local election board. An absentee voter may designate an agent to pick up and deliver a ballot. Absentee voters may also have an individual of their choice assist them in hand marking the ballot.



B.

Historically, as noted, an absentee voter who obtained an absentee ballot electronically needed to print out ballot and mark their choices by hand on the printed hardcopy ballot. For several years, Maryland has been using a piece of software referred to as an “online ballot marking tool.” The tool can be used by absentee voters who wish to obtain their absentee ballots electronically; the tool enables voters to mark their choices electronically and print out a completed ballot.<sup>1</sup> When the ballot is printed, the voter's selections appear on a number of pages followed by a separate signature page. The voter must still sign the signature page and return the entire hardcopy ballot to the board of elections. Only printed and signed ballots received by a local board of elections are counted in determining the result of an election.

Maryland's Board developed the online ballot marking tool over a number of years, including with the participation of plaintiff National Federation of the Blind. The Board has solicited feedback and implemented a number of changes and accessibility enhancements for disabled voters. The tool is not compatible with all computer browsers or operating systems, but does function properly with a variety of reasonably up-to-date products. Importantly for individuals with certain disabilities, the ability to use the tool on their own computers may enable them to use the personal assistive technology that they ordinarily use to interface with the computer, such as a refreshable Braille display, to mark their ballot.

C.

An early, non-accessible version of the online ballot marking tool was available to absentee voters during the 2012 primary elections. Following the primary elections, a question arose as to whether the tool needed to be certified pursuant to Maryland Election Law Section 9–102, which requires certification of any “voting system” to use. The Maryland Attorney General provided an opinion that the tool did not meet the statutory definition of a “voting system” and did not require certification. *See Certification of Voting Systems Does Not Apply to Absentee Ballot Marking Wizard*, \*500 97 Op. Md. Att’y Gen. 32 (2012). However, apparently due to lingering concerns over the security of the online ballot marking tool, the Board only made the tool available to certain overseas and military absentee voters for the 2012 general election. Use of the tool in the 2012 primary and general elections was apparently uneven.

The Maryland General Assembly subsequently clarified the status of the tool. In 2013, the General Assembly passed the “Improving Access to Voting Act,” 2013 Md. Laws Ch. 157, which, among other things, explicitly required the Board to certify any online ballot marking tool prior to use by voters. *See id.* (codified at Elec. Law § 9–308.1). Certification requires a supermajority: at least four of the five members of the Board must vote in favor of certification pursuant to Elec. Law § 2–102(c).

The Board continued to make improvements to the version of the tool that had been used in the 2012 elections. In particular, the Board implemented certain changes to make the tool more accessible to voters with disabilities. Additionally, in accordance with the 2013 Improving Access to Voting Act, the Board hired an independent company, Unatek Inc. (“Unatek”), to perform security testing on the tool. Unatek produced a report in December 2013 stating that use of the tool was secure.

52 NDLR P 122

In February 2014, the Board met and discussed the online ballot marking tool. The Board reviewed the 2013 Unatek report and interviewed the report's author. Some Board members continued to express concerns security of the tool, and the Board did not hold a certification vote.

The Board subsequently hired a second independent consultant, Mainstay Enterprises, Inc. ("Mainstay"), to Unatek security report. The Mainstay audit concluded that Unatek's security assessment had followed industry practices. The Board also received and reviewed public comments and had Board staff obtain information of similar ballot marking tools in other states.

The certification issue was again discussed at the Board's April 2014 meeting. At the meeting, Mainstay briefed on the results of its audit. Some Board members continued to express concerns about certification and the Board did not take a certification vote.

D.

On May 19, 2014, plaintiffs sued Linda Lamone, Maryland's State Administrator of Elections, and the Board members, all in their official capacities. At the heart of plaintiffs' suit are claims that Maryland's absentee voting process violates the ADA and the Rehabilitation Act. Plaintiffs sought both a declaratory judgment to that effect as well as an injunction requiring state election officials to make the online ballot marking tool available for use starting with the 2014 general election.<sup>2</sup> The district court subsequently scheduled a bench trial to begin on August 13, 2014. The trial would provide defendants with sufficient time to implement the tool before the 2014 general election in the event the plaintiffs prevailed.

While the suit was pending, the Board held a specially-scheduled meeting on July 10, 2014, with one Board member absent. The four Board members in attendance voted 3 to 1 to certify the online ballot marking tool. The vote did not satisfy the statutory supermajority requirement and the tool was not certified.

The district court held a three-day bench trial beginning on August 13, 2014.<sup>3</sup> The district court heard testimony about the difficulties disabled voters have experienced while voting; the Board's development of the online ballot marking tool; and the Board's deliberation over certification; the accessibility of the tool for disabled voters; and the security issues posed by the tool.

The district court found that "the evidence demonstrated specific difficulties that some disabled voters have experienced while voting," J.A. 1043, and that "under the current absentee ballot voting program, individuals with disabilities as those of the Plaintiffs cannot vote privately and independently." J.A. 1044. The district court credited the findings of a University of Baltimore usability study that concluded the tool was "highly accessible for disabled voters," J.A. 1048, though the district court acknowledged that two individuals testified that they had difficulty accessing the tool during a public demonstration period. J.A. 1048. The district court found the tool "compatible with reasonably current computer and screen access software," "designed in accordance with the Web Content Accessibility Guidelines and "compatible with refreshable Braille displays." *Id.* The district court did find that there were still "challenges to private and independent voting by absentee ballot for disabled voters even when using the tool," including that some voters may need assistance in signing their ballots before submission." *Id.* "However, the testimony at trial also showed that, because the signature sheet prints on a separate page, the risk of disclosure of a disabled voter's selection was minimalized and, in any event, was significantly less than that afforded under the current paper absentee ballot process." J.A. 1048-49.

With respect to the security risks posed by the online ballot marking tool, the district court credited expert testimony that the tool “exhibited software independence, meaning a change to the voting software used for an election would cause an undetectable change to the outcome of an election” and that “there were no additional risks that did not exist with other methods already available to Maryland voters.” J.A. 1049. The district court found that the tool was “not without some security risks” including that “malware could enable \*502 [a] third party to observe a voter’s selections; a voter’s selections could be captured if a third party infiltrated the Board’s server during the time a voter’s ballot and/or the printable ballot were being transmitted.” J.A. 1049–50. Additionally, “[t]here was no evidence that the online ballot marking tool had been tested against intentional attempts to infiltrate or hack into the Board’s server or the tool.” J.A. 1050.

The district court further found that “it is clear that most voters may mark their absentee ballots without assistance” and that plaintiffs “should be afforded the same opportunity, but the State’s current voting program does not do so.” J.A. 1055. Based on the facts found at trial, the district court concluded that plaintiffs had established that they had been denied meaningful access to absentee voting in Maryland in violation of Title II of the ADA and Section 504 of the Rehabilitation Act. The district court entered a declaratory judgment for plaintiffs to this effect. The district court also concluded that plaintiffs’ proposed remedy, access to the online ballot marking tool, was a reasonable modification that did not fundamentally alter Maryland’s voting program. Consistent with these conclusions, the district court granted a permanent injunction prohibiting defendants from violating plaintiffs’ rights under the ADA and the Rehabilitation Act and requiring defendants to make the online ballot marking tool available to plaintiffs for the 2014 general election. This appeal followed.

## II.

[1] We review judgments resulting from a bench trial under a mixed standard of review: factual findings may only be reversed if clearly erroneous, while conclusions of law are examined de novo. *Plasterers’ Local Union No. 96 v. Pepper*, 663 F.3d 210, 215 (4th Cir.2011). We review the grant of a permanent injunction for abuse of discretion. *Night Club v. Miller*, 637 F.3d 291, 297 (4th Cir.2011).

Defendants’ appeal principally focuses on the district court’s three core legal conclusions: (1) that plaintiffs were denied meaningful access to absentee voting in violation of the ADA and the Rehabilitation Act; (2) that the online ballot marking tool constitutes a reasonable remedial modification; and (3) that requiring defendants to allow access to the tool does not fundamentally alter Maryland’s voting program. We address each of these issues in turn.

## III.

[2] Title II of the ADA provides that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” 42 U.S.C. § 12132. <sup>4</sup> To make out a violation of Title II, a plaintiff must show: (1) they have a disability; (2) they are otherwise qualified to receive the benefits of a public service, program, or activity; and (3) they were denied the benefits of such service, program, or activity, or otherwise discriminated against on the basis of their disability. *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 498 (4th



52 NDLR P 122

[3] Only the third of these elements—whether plaintiffs were denied the benefits of a public service, program on the basis of their disability—is at issue here.<sup>5</sup> Much of the dispute revolves around the proper way to scope of the relevant public service or program at issue. Plaintiffs argue that the appropriate analytic scope is the absentee voting program. Defendants urge analysis of Maryland's voting program in its entirety, encompassing various voting alternatives—including in-person voting—available to Maryland voters. Defendants argue that absentee voting is not fully accessible, the full accessibility of Maryland's in-person polling places provides disavantages with meaningful access to voting. As explained below, we conclude that defendants' proposed focus is overbroad and would undermine the purpose of the ADA and its implementing regulations.

#### A.

Defendants' argument for holistic consideration of Maryland's voting program is in some immediate tension with the ADA. Title II states that a disabled individual may not be “excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” 42 U.S.C. § 12132. Defendants' proposed focus on voting in its entirety effectively reads out much of this language, suggesting that Title II prohibits only complete exclusion from participation in broadly-defined public programs. However, the prohibition is disjunctive. By its own terms it is not limited only to public “programs”; it applies to “services, programs, or activities.” *Id.* (emphasis added). Title II does not only prohibit “exclusion from participation” in a public program; it also prohibits “den[ying] the benefits” of that program. *Id.*<sup>6</sup> And in addition to those prohibitions, Title II generally prohibits “discrimination by any [public] entity.” *Id.* Although the bare language of Title II does not resolve the question of appropriate scope, it does suggest to us that some granularity in analytic focus is necessary.

The Supreme Court has cautioned against defining the scope of a public benefit so as to avoid questions of discriminatory effects. In *Alexander v. Choate*, 469 U.S. 287, 301, 105 S.Ct. 712, 83 L.Ed.2d 661 (1985), a Rehabilitation Act case, a unanimous Court counseled that in assessing whether a disabled individual had been provided with meaningful access to a benefit, “[t]he benefit itself, of course, cannot be defined in a way that effectively denies otherwise handicapped individuals the meaningful access to which they are entitled.” See also *id.* at n. 21, 105 S.Ct. 712. With approval the government's statement that “[a]ntidiscrimination legislation can obviously be emptied of its force if every discriminatory policy is ‘collapsed’ into one's definition of what is the relevant benefit.” The logic of the Court's decision further suggests that we should proceed cautiously to avoid defining a public program so generally that we overlook the difficulties in accessing government services.

Also significant for our analysis of the proper scope of review here is the fact that Maryland allows *any* voter to vote by absentee ballot. Elec. Law §§ 9-301, 9-304. Absentee ballots are not provided only to a limited set of voters with a demonstrated need to vote absentee; they are instead provided to the entire Maryland electorate at the option of the individual voter. On the whole, then, we think it is far more natural to view absentee voting—rather than the entire voting program—as the appropriate object of scrutiny for compliance with the ADA and the Rehabilitation Act.

Defendants' remaining arguments against this straightforward conclusion are unpersuasive. Defendants cite 28 C.F.R. § 35.150(a), which they assert requires a reviewing court to view Maryland's voting program “in its entirety.” However, the cited regulation expressly pertains to “existing facilities.” See *id.* (quoting 28 C.F.R. § 35.150(a)). This regulation simply provides that a public entity does not have to make each of its facilities accessible to individuals with disabilities have access to that entity's offered public services. This regulation is targeted at physical accessibility and allows a public entity to provide accessibility alternatives that would not require architectural modifications of existing facilities. *Accord Constantine*, 411 F.3d at 489 (discussing 28 C.F.R. § 35.150(a)).

52 NDLR P 122

and explaining that “structural changes in existing physical facilities” are “probably the most expensive ent providing accessibility).

Other ADA-implementing regulations, however, are applicable here and conflict with defendants' propo on the entirety of Maryland's voting program. As one example, 28 C.F.R. § 35.130 (“General prohibiti discrimination”) directly implements the general antidiscrimination mandate of Title II. Subsection (b) regulation requires public entities to make certain reasonable modifications in “policies, practices, or proce the modifications are necessary to avoid discrimination on the basis of disability”; this regulation clearly cont \*505 focus on accessibility at a more granular level than entire government programs—the level of “policies and procedures.” *Id.* <sup>7</sup>

Defendants also cite to three district court decisions from other circuits that they argue stand for the propo all aspects of a state's voting program must be viewed together when analyzing an ADA claim. Br. of Appella It is not clear to us that the cited cases in fact support defendants' proposition; in any event, we find them un Further, later decisions in some of those districts (and decisions by the courts of appeals sitting above them), t the very argument defendants advance here. *See, e.g., United Spinal Ass'n v. Bd. of Elections in New York*, 882 615, 623–24 (S.D.N.Y.2012) (“It is abundantly clear that Defendants are obligated to provide a level of acc voting program beyond the simple assurance that voters with disabilities are able to cast a ballot in some way form.”); *Disabled in Action v. Bd. of Elections in New York*, 752 F.3d 189, 198–99 (2d Cir.2014) (“[T]o assume is ... merely the opportunity to vote at some time and in some way [ ] would render meaningless the mandate entities may not afford persons with disabilities services that are not equal to that afforded others.” (quotation

#### B.

[4] Having determined that Maryland's absentee voting program is the appropriate subject of our ADA must determine whether absentee voting is accessible to disabled individuals as required by statute and im regulations. As the Supreme Court has explained:

Congress enacted the ADA in 1990 to remedy widespread discrimination against disabled individuals. In s need for such legislation, Congress found that “historically, society has tended to isolate and segregate with disabilities, and, despite some improvements, such forms of discrimination against individuals with continue to be a serious and pervasive social problem.”

*PGA Tour, Inc. v. Martin*, 532 U.S. 661, 674–75, 121 S.Ct. 1879, 149 L.Ed.2d 904 (2001) (quoting 42 U.S.C. (2)). Congress explicitly found that discrimination was not limited to “outright intentional exclusion,” but wa found in “the ‘failure to make modifications to existing facilities and practices.’ ” *Id.* at 675, 121 S.Ct. 1879 ( U.S.C. § 12101(a)(5)). After thorough investigation and debate, Congress concluded that there was a “compe for a “clear and comprehensive national mandate” to both eliminate discrimination *and* to integrate \*50 individuals into the social mainstream of American life. *Id.* (internal citations omitted). “In the ADA, Congre that broad mandate.” *Id.*

[5] Congress has explicitly directed the Attorney General to promulgate regulations implementing Ti discrimination mandate. 42 U.S.C. § 12134. Pursuant to this directive, the Department of Justice (“DoJ”) pr a number of regulations, including 28 C.F.R. § 35.130. That regulation provides:

A public entity, in providing any aid, benefit, or service, may not ... [a]fford a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others ... [or] [p]rovide a qualified individual with a disability with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result

28 C.F.R. § 35.130(b)(1)(ii)-(iii).<sup>8</sup> We have recognized that “[t]he department’s regulations are the agency’s interpretation of the statute, and they are therefore given ‘controlling weight’ unless they conflict with other departmental regulations or the ADA itself.” *Seremeth*, 673 F.3d at 338 (citing *Stinson v. United States*, 508 U.S. 36, 113 S.Ct. 1913, 118 L.Ed.2d 598 (1993), and *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844, 104 S.Ct. 2778, 81 L.Ed.2d 184 (1984)).

[6] We have little trouble concluding from the record before us that Maryland’s absentee voting program does not provide disabled individuals an “opportunity to participate ... equal to that afforded others.” See 28 C.F.R. § 35.130(b)(1)(ii). The district court found that “it is clear that most voters may mark their absentee ballots without a third party’s assistance.” J.A. 1055. This finding is not clearly erroneous. The district court further found that Maryland’s current absentee program does not allow disabled individuals such as plaintiffs to mark their ballots without assistance. *Id.* This finding is also not clearly erroneous. This sharp disparity makes obvious that defendants have provided “an aid, benefit, or service [to disabled individuals] that is not as effective in affording equal opportunity to obtain the same result, the same benefit, or to reach the same level of achievement as that provided to others.” See 28 C.F.R. § 35.130(b)(1)(iii). The ADA requires more.

Defendants do not seriously challenge the district court’s factual findings concerning plaintiffs’ current inability to vote without assistance. Instead, defendants argue that plaintiffs have not been denied meaningful access to absentee voting because disabled individuals such as plaintiffs have no right to vote without assistance. See Br. of Appellants’ Reply at 10. This argument simply misapprehends the nature of plaintiffs’ claims.

This case does not turn on whether there is a standalone right to vote privately and independently without assistance. Plaintiffs’ argument is that defendants have provided such a benefit to non-disabled voters while denying the same benefit to plaintiffs on the basis of their disability. This is precisely the sort of harm the ADA seeks to prevent. See *Disabled in Action*, 752 F.3d at 199–200 (“Although [plaintiffs] were ultimately able to cast their vote with the assistance of others, the purpose of the Rehabilitation Act is ‘to empower individuals \*507 with disabilities to achieve self-employment, economic self-sufficiency, independence, and inclusion and integration into society’.... The right to vote should not be contingent on the happenstance that others are available to help.” (emphasis by 2d Circuit) (quoting 28 U.S.C. § 701(b)(1))); *Cal. Council of the Blind v. Cty. of Alameda*, 985 F.Supp.2d 1229, 1239 (N.D.Cal.2013) (“The ADA requires that blind and visually impaired individuals to vote with the assistance of a third party, if they are to vote at all. Defendants’ argument provides these individuals with an inferior voting experience ‘not equal to that afforded others.’” (quoting 28 C.F.R. § 35.130(b)(1)(ii))).

[7] Voting is a quintessential public activity. In enacting the ADA, Congress explicitly found that “‘individuals with disabilities ... have been ... relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals.’” *Tennessee v. Lane*, 541 U.S. 509, 516, 124 S.Ct. 1978, 158 L.Ed.2d 166 (2004) (quoting 42 U.S.C. § 12101(a)(7)). Ensuring that disabled individuals are afforded an opportunity to participate in voting that is equal to that afforded others, 28 C.F.R. § 35.130, helps ensure that those individuals are not relegated to a position of political powerlessness. We affirm the district court’s conclusion that by effectively requiring disabled individuals to rely on the assistance of others to vote absentee, defendants have not provided plaintiffs with access to Maryland’s absentee voting program.

IV.

[8] Determining that plaintiffs have been denied meaningful access to absentee voting does not end our analysis. Public services, programs, or activities can be made meaningfully accessible to all citizens, or at least they can be so without a prohibitive cost or unreasonable effort on the part of the public entity. For this reason, to prevail on an ADA claim, plaintiffs must propose a reasonable modification to the challenged public program that will allow them the meaningful access they seek. *See, e.g., Halpern v. Wake Forest Univ. Health Scis.*, 669 F.3d 454, 464 (4th Cir. 2012) (noting that federal law mandates that federal grantees and public accommodations make “reasonable” modifications to accommodate persons with disabilities).<sup>9</sup>

[9] [10] DoJ regulations implementing the ADA explain that “[a] public entity shall make reasonable modifications to its policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability.” 28 C.F.R. § 35.130(b)(7).<sup>10</sup> A modification is reasonable if it is “reasonable on its face” or used “ordinarily or in a variety of cases” and will not cause “undue hardship.” *Halpern*, 669 F.3d at 464 (citing *U.S. Airways, Inc. v. Barnett*, 538 U.S. 391, 401–02, 122 S.Ct. 1516, 152 L.Ed.2d 589 (2002)); *cf. Henrietta D. v. Bloomberg*, 331 F.3d 261, 280 (2d Cir. 2003) (stating that the burden of establishing the reasonableness of an accommodation is “‘not a heavy one’” and “‘not enough for the plaintiff to suggest the existence of a plausible accommodation, the costs of which, facially, clearly exceed its benefits’” (quoting *Borkowski v. Valley Cent. Sch. Dist.*, 63 F.3d 131, 138 (2d Cir.1995))). Determination of the reasonableness of a proposed modification is generally fact-specific. *Halpern*, 669 F.3d at 464.

[11] The district court here found that plaintiffs’ proposed modification—the online ballot marking tool—is reasonably secure and reasonably accessible to disabled voters. Reviewing the record as a whole, these findings appear clearly erroneous and we see no need to disturb them. Further, although not determinative by itself, the fact that a version of the tool was voluntarily implemented by defendants in the 2012 elections—“without any apparent cost”—*J.A.* 1057—speaks to the reasonableness of using the tool. Additionally, because the tool has already been implemented, there does not appear to be any substantial cost or implementation burden that would need to be borne by defendants to make the tool available for use. On the facts before us, we conclude that plaintiffs’ proposed use of the online ballot marking tool is a reasonable modification to Maryland’s absentee voting policies and procedures.

V.

[12] [13] [14] Defendants correctly argue that even a reasonable modification to Maryland’s absentee voting program need not be made if that modification would “fundamentally alter” the program. *See* 28 C.F.R. § 35.130(b)(7) (2012); *Halpern*, 669 F.3d at 464. Defendants bear the burden of proving that the requested modification would be a fundamental alteration to the program. *See* 28 C.F.R. § 35.130(b)(7). After considering defendants’ arguments and reviewing the record as a whole, we conclude that they have not met this burden.

Defendants’ principal argument is that certification of voting systems, including certification of the online ballot marking tool under Election Law Section 9–308.1, is fundamental to Maryland’s voting program. They argue that requiring them to make the online ballot marking tool available for plaintiffs’ use, where that tool has not been certified, works a fundamental alteration to Maryland’s voting program. In response, plaintiffs argue that the statutorily-required supermajority vote, which is required for certification, works a fundamental alteration to Maryland’s voting program. Defendants argue, the district court abused its discretion in enjoining them to make the tool available to plaintiffs. We disagree.<sup>11</sup>



[15] [16] As an initial matter, the strong form of defendants' argument—that the mere fact statutory requirement insulates public entities from making otherwise reasonable modifications to prevent discrimination—cannot be correct. The Constitution's Supremacy Clause establishes that valid federal legislation pre-empt state laws. *Oneok, Inc. v. Learjet, Inc.*, — U.S. —, 135 S.Ct. 1591, 1595, 191 L.Ed.2d 511 (2015) (citing Const. Art. VI, cl. 2). The Supreme Court has held that the ADA's Title II, at least in certain circumstances, is a valid exercise of 14th Amendment powers, *Lane*, 541 U.S. at 533–34, 124 S.Ct. 1978, and as such it trumps regulations that conflict with its requirements. As the Sixth Circuit has put it, “[r]equiring public entities to make changes to rules, policies, practices, or services is exactly what the ADA does.” \*509 *Jones v. City of Monroe, MI*, 474, 487 (6th Cir.2003) (citing *Oconomowoc Residential Programs, Inc. v. City of Milwaukee*, 300 F.3d 775, 781 (6th Cir.2002)), *abrogated on other grounds by Anderson v. City of Blue Ash*, 798 F.3d 338 (6th Cir.2015); *accord M. v. New York State and Local Ret. Sys.*, 707 F.3d 144, 163 (2d Cir.2013) (“If all state laws were insulated from reasonable modification requirement solely because they were state laws ... the ADA would be powerless to require reasonable modification in any requirement imposed by state law, no matter how trivial the requirement and how minimal the costs of doing so.”).

However, we also think that the converse proposition cannot be correct either. Certain requirements of state law may be fundamental to a public program in a way that might resist reasonable modifications otherwise necessary to bring that program into compliance with the ADA. Defendants here urge that Maryland's statutory certification requirement is just such an example: certification, they argue, goes to the very heart of the voting program by ensuring the integrity of the voting process as a whole. Public confidence in elections is undoubtedly an important governmental concern. The record before us shows that defendants simply have not established their premise, that is, that use of the online ballot marking tool degrades the integrity of Maryland's voting processes.

Put another way, defendants are merging Maryland's *procedural* certification requirement with substantive requirements about whether the tool should be certified. The mere fact that a procedural requirement has not been met does not necessarily mean that the underlying substantive purpose of that requirement has not been met. The underlying inquiry is fact-specific. *See, e.g., Halpern*, 669 F.3d at 464–67; *cf. Jones*, 341 F.3d at 480 (“In cases involving waiver of rules and regulations, the overall focus should be on whether waiver of the rule in the particular case would be at odds with the purposes behind the rule that it would be a fundamental and unreasonable change.” (quoting *The relevant inquiry here is not whether certification qua certification is fundamental to Maryland's voting process but whether use of the tool without certification would be so at odds with the purpose of certification that it would be unreasonable.* <sup>12</sup>

Here, the district court found, after a three-day bench trial, that the tool is reasonably secure, safeguards disability privacy, and (in earlier versions at least) has been used in actual elections without apparent incident. <sup>13</sup> We doubt these findings are clearly erroneous and defendants have not provided any substantial reasons that they should be set into question. *Cf., e.g., Pepper*, 663 F.3d at 215 (“[I]f the district court's account of the evidence is plausible on the record in its entirety, we will not reverse the district court's finding simply because we have become convinced that we would have decided the question of fact differently.” (quoting *TFWS, Inc. v. Franchot*, 572 F.3d 18 (6th Cir.2009))). On the record as a whole, we do not conclude that use of the online ballot marking tool is so at odds with the purposes of certification that its use would be unreasonable. We agree with the district court that defendants have not met their burden to show that plaintiffs' proposed modification—use of the online ballot marking tool—fundamentally alters Maryland's voting program.

VI.

We recognize that some of the standard analytic language used in evaluating ADA claims—“failure to make accommodations”; “denial of meaningful access”—carries with it certain negative connotations. We would not be highlighting that the record is devoid of any evidence that the defendants acted with discrimination in implementing Maryland’s absentee voting program. Indeed, we recognize that Maryland’s decision to preclude absentee voting to all its citizens provides a benefit that is far from universal across the United States.

However, the ADA and the Rehabilitation Act do more than simply provide a remedy for intentional discrimination. They reflect broad legislative consensus that making the promises of the Constitution a reality for individuals with disabilities may require even well-intentioned public entities to make certain reasonable accommodations. Our conclusions here are not driven by concern that defendants are manipulating the election apparatus to intentionally discriminate against individuals with disabilities; our conclusions simply flow from the basic promise of equal access to services that animates the ADA.

For the foregoing reasons, we affirm.

*AFFIRMED*

All Citations

813 F.3d 494, 52 NDLR P 122

Footnotes

- 1 The tool provides the voter an interface program on the computer they are using. Voters mark their ballots using the program and are then presented with a review screen that allows voters to verify that their selections are accurate. After the voter confirms the selections, the computer transmits the information to the state election board’s computer server, which generates a marked ballot in the form of a PDF file, which the voter can then print out.
- 2 Plaintiffs also sought a preliminary injunction requiring election officials to make the tool available for the June primary election. The district court held a hearing on June 11, 2014, and ultimately denied plaintiffs’ request.
- 3 On August 1, 2014, less than two weeks before trial, several individuals and entities who were similarly situated to plaintiffs filed a motion to intervene in the case. The putative intervenors asserted similar ADA and Rehabilitation Act claims with additional claims against Maryland state officials under 42 U.S.C. § 1983 for various alleged constitutional violations. The putative intervenors argued that their rights had been violated in ways substantially similar to plaintiffs, but almost diametrically opposed remedy—an injunction barring certification of the online ballot marking tool. Very few putative intervenors appeared to be concerned that the tool plaintiffs sought to require Maryland to use was not accessible to disabled voters.  
The district court held a conference with all parties and the putative intervenors on August 8, 2014. With the participation of all the parties, the district court held the motion *sub curia* and permitted the putative intervenors to participate. In its memorandum opinion in this case, the district court ultimately granted the motion to the extent of the participation up to and through trial, and considered the intervenors’ evidence and legal arguments in reaching its decision. The district court denied the motion to the extent the intervenors sought to assert independent claims against the state. It does not appear that either the parties or the intervenors have appealed any part of the district court’s disposition of this issue, and we see no reason to disturb it.
- 4 Section 504 of the Rehabilitation Act similarly provides that “[n]o otherwise qualified individual with a disability, by reason of her or his disability, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination by any entity that receives federal financial assistance or that is a department or agency of the United States ... shall, solely by reason of her or his disability, be excluded from the participation in, be denied the

52 NDLR P 122

or be subjected to discrimination under any program or activity receiving Federal financial assistance.” 29 U “Claims under the ADA’s Title II and the Rehabilitation Act can be combined for analytical purposes because is ‘substantially the same.’ ” *Seremeth v. Bd. of Cty. Comm’rs Frederick Cty.*, 673 F.3d 333, 336 n. 1 (4th Cir.2011); *Doe v. Univ. of Md. Med. Sys. Corp.*, 50 F.3d 1261, 1265 n. 9 (4th Cir.1995)). Because under the circumstances of this case plaintiffs’ ADA and Rehabilitation Act claims rise and fall together, for simplicity our opinion combines and principally analyzes the ADA claim. *Cf.*, e.g., *A Helping Hand, LLC v. Baltimore Cty., Md.*, 515 F.3d 356, 362 (4th Cir.2016) (“Congress has directed courts to construe the ADA to grant at least as much protection as the Rehabilitation Act implementing regulations.”).

5 Title II allows plaintiffs to pursue three distinct grounds for relief: (1) intentional discrimination or disparate treatment; (2) disparate impact; and (3) failure to make reasonable accommodations. *A Helping Hand, LLC*, 515 F.3d at 362. The district court somewhat mischaracterize plaintiffs’ claims as advancing a disparate impact theory of discrimination. *See*, Appellants 38. While some sort of disparity will necessarily be present in cases of discrimination, that does not mean that all discrimination cases are legally evaluated as “disparate impact” cases; we do not interpret plaintiffs’ arguments as advancing a legal disparate impact theory (and the district court did not evaluate them as such). We understand plaintiffs to base their claims on the theory that defendants have failed to make reasonable accommodations that would afford individuals meaningful access to Maryland’s absentee voting program.

6 The United States, as *amicus*, suggests that defendants would still be in violation of Title II even were we to conclude that Maryland’s entire voting program was “the” program subject to Title II’s requirements. We acknowledge that it is in the view the ability to vote from the comfort of one’s home as one of the “benefits” of Maryland’s overall voting program, the denial of which benefit on the basis of disability might support a Title II claim. However, given our conclusion below, we must evaluate Maryland’s absentee voting program directly, we need not address the United States’s contention.

7 As another example, 28 C.F.R. § 35.160 states that “[a] public entity shall take appropriate steps to ensure that communications with [disabled persons] are as effective as communications with others” and “shall furnish appropriate auxiliary aids where necessary to afford individuals with disabilities ... an equal opportunity to participate in, and enjoy the benefits of, a service, program or activity of a public entity.” *Id.* § (a)(1), (b)(1). The requirement to provide “auxiliary aids and services” again suggests to us that accessibility cannot be adequately assessed at the highest level of program abstraction. The United States argues that this particular regulation alone is a sufficient basis to affirm the decision here. *Br. for United States as Amicus Curiae* 17–19. We think that the ADA itself and the general anti-discrimination regulation discussed at the most direct resolution in this case. We therefore need not consider whether there might be other independent grounds that support an ADA or Rehabilitation Act claim on the facts here.

8 The Rehabilitation Act’s regulations impose similar requirements. *See*, e.g., 45 C.F.R. § 84.4(b)(1)(ii)-(iii).

9 *Halpern* was a Title III and Rehabilitation Act case. We have noted that in general the different language of Title III and the Rehabilitation Act should be construed together to the extent possible. *Halpern*, 669 F.3d at 461–62 (collecting cases). The regulations, however, do not require implementation of even reasonable modifications where the “public entity cannot demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.” C.F.R. § 35.130(b)(7). We address defendants’ “fundamental alteration” defense below.

10 Given our conclusion that use of the online ballot marking tool does not fundamentally alter Maryland’s program, we find no abuse of discretion in the district court’s decision to issue the injunction as the other factors to be considered in favor of granting injunctive relief. *Cf. Legend Night Club*, 637 F.3d at 302–03.

11 The problem with conflating procedure and substance here can be illustrated by analogy to the archetypal physical modifications often associated with the ADA. It would be difficult for a government entity to resist installation of, for example, wheelchair ramps for a new courthouse, solely by enacting a law requiring that ramps be certified and then declining to install any ramps.

12 Nothing in the post-trial record indicates any problems with the use of the tool by plaintiffs in the 2014 general election subsequent to the district court’s decision.

End of Document

© 2016 Thomson Reuters. No claim to original U.S. Government Works.

9/27/2016

Absentee problems revealed in St. Louis election will affect others come November | Political Fix | stltoday.com

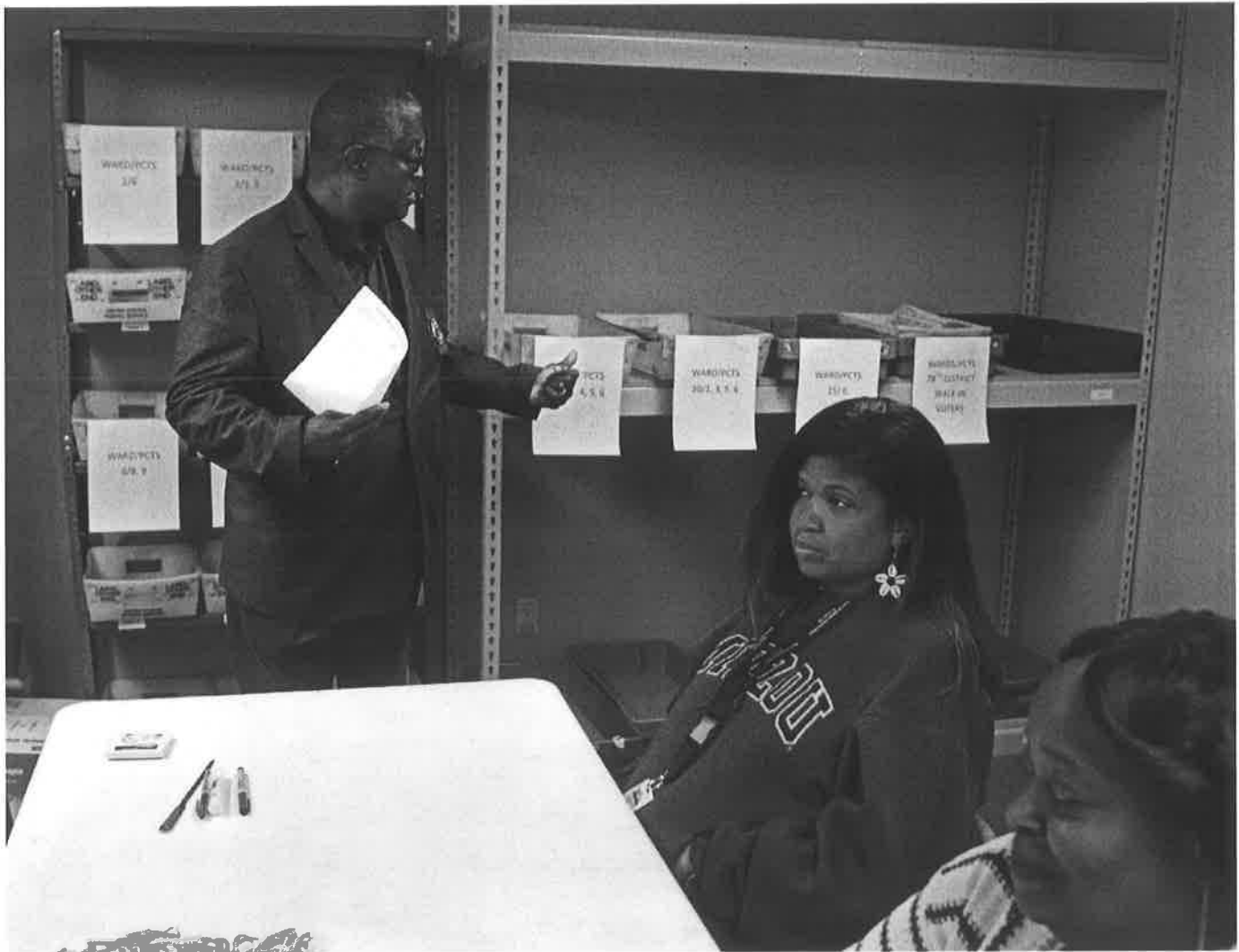
Electronically Filed - EASTERN DISTRICT CT OF APPEALS - September 28, 2016 - 10:10 AM

## Political Fix

[http://www.stltoday.com/news/local/govt-and-politics/absentee-problems-revealed-in-st-louis-election-will-affect-others/article\\_71352b91-7aaa-525b-b671-08643ec780c7.html](http://www.stltoday.com/news/local/govt-and-politics/absentee-problems-revealed-in-st-louis-election-will-affect-others/article_71352b91-7aaa-525b-b671-08643ec780c7.html)

### Absentee problems revealed in St. Louis election will affect others come November

By Stephen Deere and Doug Moore St. Louis Post-Dispatch Sep 26, 2016



Benjamin Phillips, (left), a St. Louis Election Board Commissioner, prepares election worker on Friday, Sept. 16, 2016, to begin the official counting of absentee ballots in a special election to decide the winner of Missouri's 78th district state representative seat between Penny Hubbard and Bruce Franks. Photo by Christian Gooden, cgooden@post-dispatch.com

EXHIBIT B



**ST. LOUIS** • For years, election authorities in some of Missouri's most populous counties have routinely ignored the painstaking process outlined in state law for handling absentee votes.

The penalty for those violations will become more evident as the November presidential election nears and those agencies confront a logistical dilemma: How to open tens of thousands of additional ballot envelopes on Election Day?

Earlier this month, St. Louis Circuit Judge Rex Burlison tossed out the results of a state House race in the Aug. 2 Democratic primary solely on a technicality: The St. Louis Board of Election Commissioners had allowed 142 people to vote absentee at the board's office without using envelopes.

In the August race for the 78th District seat, State Rep. Penny Hubbard had defeated Bruce Franks Jr. by 90 votes.

"These irregularities were more than petty procedural infirmities but abuses of the election law which cannot be ignored," Burlison said.

Missouri's Court of Appeals agreed with the judge, and in the re-do election on Sept. 16, Franks defeated Hubbard, garnering 76 percent of the vote.

The fallout from that court battle has created a challenge for some election authorities who must change the way they have operated. Absentee voting for the Nov. 8 election begins Tuesday.

The Post-Dispatch contacted election authorities in Missouri's 10 most populated counties. In addition to St. Louis city, St. Louis County, Jefferson County and the Kansas City Board of Elections have either allowed in-person absentee voters to feed their paper ballot into a box or to use electronic touch screens — practices deemed to be a clear violation of state law because they don't involve ballot envelopes containing information on each voter.

Burlison's ruling was a hot topic at the annual Missouri Association of County Clerks and Election Authorities held this week in Sikeston, Mo., and it also came up in training sessions on the other side of the state.

9/27/2016

Absentee problems revealed in St. Louis election will affect others come November | Political Fix | stltoday.com

"We're not making changes because, I'll be real honest, we've always followed the law," said Jim McKinzie, assistant director of Jackson County Board of Election Commissioners, during a break last week from training workers.

"I was just telling them: 'We do not want to be a St. Louis, so follow the rules like I've outlined, like we've always done, and we won't be in the paper,'" McKinzie said.

## The fallout

Why are envelopes so important?

Under state law, representatives from opposing campaigns are allowed to witness election workers as they unseal envelopes containing absentee ballots and challenge them if an election violation is suspected.

But once a ballot is placed in a box or filled out electronically, it becomes impossible to challenge, because it is no longer connected to the voter. Unlike their envelopes, ballots contain no information identifying the voter.

Now, to comply with Missouri's absentee voting statutes, St. Louis County will likely have to open thousands of additional ballot envelopes on Election Day.

That means hiring additional workers and finding the space for them, said Eric Fey, Democratic director of the St. Louis County Election Board.

"Judge Burlison was correct in what he said in his ruling that it's a very 'tedious' and 'specific' process," Fey said.

Christian Tolbert, the Republican director, said in an email that it is expected to cost \$250,000 "for the additional 40,000 envelopes and 60,000 ballots as well as funding 80 more temporary employees for the five day opening period."

In Jefferson County, County Clerk Wes Wagner estimates officials will have to open 15,000 ballots. Wagner is recruiting college and high school students to help out.

9/27/2016

Absentee problems revealed in St. Louis election will affect others come November | Political Fix | stltoday.com

With veteran poll workers supervising, the students will open the envelopes with a letter opener, unfold them and then feed them into an optical scan machine. Wagner estimates two ballots can be processed a minute, about 1,200 a day per team. With 12 to 14 teams, absentee ballots should be counted by the time the polls close, Wagner said.

J. Casey Martin, board chairman of the Kansas City Election Board, said: "We've reviewed that case thoroughly and we are talking with our legal counsel to make sure all practices for the Nov. 8 election are up to snuff."

## Which law to violate?

Selena Gomez: Most Beautiful Hair Ever with Pantene Expert | Pantene Commercial



Officials at St. Louis and Kansas City election authorities, along with those in Jefferson and St. Louis counties, all make the same argument for why they have allowed in-person absentee voters to use touch screens.

Federal law, specifically the Help American Vote Act of 2002, demands it, they say. Congress passed the act in the aftermath of the 2000 presidential election that revealed mass confusion among Florida voters by "butterfly ballots" and "punch card" voting.

9/27/2016

Absentee problems revealed in St. Louis election will affect others come November | Political Fix | stltoday.com

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - September 28, 2016 - 10:10 AM

The law provided funds to local election authorities for electronic voting machines. It also mandated each polling location have a voting system accessible to individuals with disabilities, including a non-visual system for the blind. The voting system must provide an equal opportunity for voting in private without assistance.

Thus, some state election officials argue that the federal law has forced them to provide electronic voting for absentees.

Wagner said the “back channel” discussions have always been: “What set of laws are we going to violate? State laws or federal laws?”

But at least one other county clerk suggested the choice may not be so difficult.

Boone County Clerk Wendy S. Noren agreed that her office must offer visually impaired voters a means to fill out their ballot in private because federal law trumps state law.

So Noren allows anyone with a disability to use a machine for absentee voting at county clerk’s office leading up to the election — but that’s the only exception.

Everyone else puts their ballot in an envelope.

“The federal law doesn’t require it (to be available) for everybody,” Noren said.

And how many times in the past decade has she had voters with disabilities request electronic voting?

Twice, she said.

## St. Louis’ impact

St. Louis politics has long been an impetus for election reform.

In fact, the roots of some of Missouri’s “tedious” and “specific” absentee voting laws at issue now were created because of irregularities during the 1982 Democratic primary in St. Louis — which saw allegations of vote buying, intimidation and bulk notarizations.

A campaign worker, a notary and a minister were indicted.

9/27/2016

Absentee problems revealed in St. Louis election will affect others come November | Political Fix | stltoday.com

"They were actually going around selling votes in those days," Noren said. "It was \$10 a vote."

The late James Kirkpatrick, then Missouri's secretary of state, put Noren on a panel to recommend legislation to prevent abuses.

In the primary election in August, a Post-Dispatch investigation has revealed multiple other irregularities in addition to the failure to use envelopes for in-person absentee ballots. The problems included allegations of intimidation and falsified ballot applications.

Noren wrote some of the statutes with which St. Louis is now grappling. When she heard about challenges faced by other election authorities in advance of the November election, she didn't have much sympathy. To her, the law is clear, especially when a procedure in the law is prefaced by the word "shall."

"The envelopes are a mess," she said. "Every single one of us would love to (do away with them), but the law says we have to do it. ... Life would be easier if we didn't have all these 'shalls' and I could just do what I wanted."

That said, the Missouri Legislature has changed the policy for having envelopes accompany absentee ballots cast in person. However, the new law does not go into effect until 2018.

### Election 2016 from St. Louis Post-Dispatch

Stay in the race. Get our free political newsletter featuring local and national updates and analysis.

### Stephen Deere

Stephen Deere is a reporter for the St. Louis Post-Dispatch.

### Doug Moore

Doug Moore is a reporter for the St. Louis Post-Dispatch.

9/27/2016

Absentee problems revealed in St. Louis election will affect others come November | Political Fix | stltoday.com

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - September 28, 2016 - 10:10 AM